

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DANIEL TEPOEL,

Defendant.

ORDER

10-cv-629-bbc
07-cr-66-bbc

Defendant Daniel TePoel has filed a motion for relief from his conviction and sentence under 28 U.S.C. § 2255, contending that the court deprived him of his rights by not ordering a competency evaluation of his ability to represent himself at his criminal trial. The motion will be denied. It is untimely, because it was not filed within one year of the date on which defendant's conviction became final (October 5, 2009, the date on which his petition for a writ of certiorari was denied by the United States Supreme Court, TePoel v. United States, 130 S. Ct. 171 (2009)), even giving defendant the benefit of the "mailbox rule," which deems that mail from unrepresented prisoners is "filed" when delivered to the prison authorities. Houston v. Lacke, 487 U.S. 266 (1988). Defendant did not deposit his

motion in the prison mail system until October 15, 2010, as he certifies on page 13 of the motion. Even if the filing were timely, however, defendant's motion fails on its merits because he has failed to adduce any evidence to support his claim that he was mentally incapable of representing himself at trial.

A. Background

Defendant was charged by the grand jury in an eight-count indictment returned on April 17, 2007. The counts included charges of mail and wire fraud, conspiracy and making false statements against defendant and his co-defendant in connection with a scheme to solicit investments in a "prime bank scheme" that would produce high returns at no risk. According to the indictment, defendants did not place investor funds into prime bank instruments, but used the money to pay their own travel and personal living expenses, gave it to their family members as gifts or spent it on development of a resort project in Grenada that failed.

Between the time defendant was indicted and the time he went to trial, the court appointed three different counsel to represent him, all at government expense. Defendant was unable to work with any of the appointed counsel, although the magistrate judge warned him repeatedly that he would not be assigned another attorney if he could not work with the third one. When defendant parted ways with the last attorney, the magistrate judge refused

to appoint new counsel, although he relented when a fourth lawyer indicated she would be willing to try. Although defendant found her lacking and refused to let her represent him at trial, he agreed to her help as stand-by counsel. At trial, the jury found defendant guilty on all eight counts. Afterwards, he asked that the fourth attorney be reappointed to represent him at his sentencing but he became dissatisfied with her performance and represented himself at sentencing.

Defendant took a direct appeal of his sentence and conviction, arguing that he had been denied the right to examine the grand jury selection records, that he had been selectively prosecuted because of an abuse of the grand jury process and that he had been denied his constitutional right to assistance of counsel. He did not say anything about having been incompetent to make the decision to represent himself. The court of appeals found no merit to any of the three claims that defendant raised, holding that defendant had constructively waived his right to counsel. Defendant filed a petition for a writ of certiorari. He says that the petition was denied on October 17, 2009, which would make this motion timely, but the Supreme Court's records show that the date was October 5, 2009.

B. Discussion

Under 28 U.S.C. § 2255(f), a defendant challenging a federal conviction or sentence has one year from the date on which the judgment of conviction became final. Defendant's

conviction became final on October 5, 2009, the date on which the Supreme Court denied his petition for a writ of certiorari. The fact that defendant did not receive notice of the decision until October 17, 2009 does not mean that his time for filing is extended by 12 days. Clay v. United States, 537 U.S. 522, 527 (2003) (“Finality attaches when [Supreme] Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.”) Defendant’s motion was filed beyond the one-year limitation period and is untimely.

Even if the motion had been filed within the limitations period, it would not succeed. First, § 2255 is not intended to be either a substitute for a direct appeal or an opportunity to reargue matters decided on direct appeal. The law of the case doctrine prevents reargument. Varela v. United States, 481 F.3d 932, 935 (7th Cir. 2007) (holding that § 2255 not a substitute for belated appeal and that issues raised on direct appeal may not be reconsidered). Therefore, this court could not entertain any argument relating to defendant’s claim that he was denied his right to the assistance of counsel when he was found to have constructively waived that right. That issue has been decided against defendant by the court of appeals and is the “law of the case.”

Defendant does not confine his motion to that claim but argues that he was incompetent to represent himself at trial. He says that neither the court nor any one of his four court-appointed attorneys recognized his incompetence, thereby denying him a chance

for a fair trial.

The problem with defendant's argument is that he has cited no evidence that would support his allegation of incompetency. Although he says that anyone observing his actions should have recognized that he was not competent to represent himself, he is wrong. Four experienced lawyers worked with him; none detected any reason to question his competency to make decisions, even if they disagreed with the decisions he made. The magistrate judge held a plethora of hearings with defendant, but never questioned his competency. I observed nothing about defendant's mental competency during his four-day trial that would have suggested he was mentally incapable of representing himself. Defendant did not do a particularly good job of representing himself, but few people do in that situation. He was not demonstrably worse than other pro se defendants, so although most of his argument struck me as wrong-headed, there was no reason to think he might have such serious mental handicaps that he could not proceed. He was not incoherent, as he insists, and he did not seem confused in any sense that would indicate a state of legal incompetency.

Defendant argues that it is unfair to put the burden on him to prove his incompetency "where either the court, or the government, had a duty to act in regard to establishing the defendant's competency to stand trial," Def.'s Br., dkt. #188, at 2, but he is wrong. He says later in his brief that he is not "mentally incompetent to appear and stand before a court as a defendant. He is not pleading insanity." Id. at 3. Instead, he says, he

was of diminished mental capacity and this should have been clear from his changes in position and his “pattern of breakdowns,” id. at 4, with his court appointed counsel.

It is puzzling that defendant insists now that he was incapable of making a decision to proceed to trial without counsel, when he cites nothing that would explain why he now knows the extent of his alleged incompetency when he had no idea about it in 2007 or 2008, when he went to trial. He has submitted no new medical evidence. He refers to two automobile accidents that he says may be the cause of his alleged confusion and inability to understand what is going on, but these accidents occurred long before he was indicted in this case. If he thought that these accidents made it difficult for him to understand what was being said to him, he could have said so early in the proceedings. Defendant’s belated “discovery” that he did not understand his situation at the time of trial appears to be remorse about the consequences of his bad decisions, not an indication of legal incompetency.

In essence, defendant’s attempt to argue that the court should have made a greater effort to warn him about the dangers of proceeding pro se is just a variation of the issue he raised on appeal, which he is barred from raising again. The court of appeals found that he had constructively waived his right to counsel and that this court had not denied him his right to counsel by refusing to appoint a fifth lawyer to represent him. Defendant has not shown that he can surmount the law of the case. Therefore, his motion would have to be

denied even if it were timely.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Daniel TePoel's motion brought under 28 U.S.C. § 2255 for vacation of his conviction and sentence is DENIED as untimely. No certificate

of appealability shall issue.

Entered this 13th day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge